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No. 84-1484

In the Supreme Court of the United States

OCTOBER TERM, 1985

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, ET AL., APPELLANTS

v.

GOULD INC.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE SUPPORTING APPELLEE

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QUESTION PRESENTED

Whether the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, preempts a state statute debarring employers from doing business with the State if they have been found by courts of appeals to have violated the Act three times within five years.

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INTEREST OF THE NATIONAL LABOR RELATIONS BOARD

The question presented in this case is whether the National Labor Relations Act preempts a state law debarring an employer who has violated the Act from doing business with the State. Relying on *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), and its progeny, the court of appeals held that the state statute is preempted by the Act and therefore invalid under the Supremacy Clause because it impermissibly supplements the remedial scheme established by Congress in the Act. Formulating and implementing appropriate remedies for violations of the Act are central to the mission of the National Labor Relations Board. The Board accordingly has a significant interest in the proper application to this case of the preemption doctrine, which is

designed to preclude interference with the uniform administration of federal law by conflicting state rules and remedies.

STATEMENT

1. The State of Wisconsin provides by statute that persons or firms that have been found by orders of the National Labor Relations Board enforced by courts of appeals to have violated the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, in three separate cases within a five-year period shall be placed on a list of labor law violators for three years. Wis. Stat. Ann. § 101.245 (West Supp. 1984-1985). Persons or firms found in contempt of court for "failure to correct" three separate violations of the Act within five years must also be placed on the list. *Ibid.* The State "shall not purchase any product known to be manufactured or sold by any person or firm included on the list of labor law violators." *Id.* § 16.75(8).

In 1982, the State placed appellee Gould Inc. on the list of violators and announced that two contracts between Gould and the State would be cancelled as soon as practicable and that the firm would not be awarded any new state contracts until 1985. The State also notified all of its current and potential vendors that they could not sell to the State any product that contained components produced by Gould. Gould, a Delaware corporation with its principal place of business in Illinois, was placed on the list because of the enforcement of four Board orders against various divisions of the company, none of which were located in Wisconsin. Gould no longer owned any of these divisions at the time that it was placed on the list. J.S. App. 6-7, 50-53.

2. Gould filed this action in the United States District Court for the Western District of Wisconsin,

seeking injunctive and declaratory relief with respect to the State's enforcement of its debarment statute on the ground that the state law was preempted by the NLRA and therefore invalid under the Supremacy Clause.[1] On cross-motions for summary judgment, the district court ruled that the Wisconsin statute is preempted and permanently enjoined the State (through its officials) from enforcing it against Gould (J.S. App. 45-83).[2]

The district court reasoned (J.S. App. 56-66) that whether the Wisconsin debarment statute is preempted depends on a balancing of relevant state and federal interests. The court rejected (*id.* at 66-74 & n.7) the State's assertions that its proprietary purchasing function was furthered by the statute and that it was acting purely as a market participant (*id.* at 72-73 (emphasis deleted)):

> [The statute] is directed specifically towards effecting [*sic*] the labor relations of those employers who are adjudicated federal labor law violators. Defendants have not suggested that §§ 101.245 and 16.75(8) have any legitimate nonlabor purpose * * *.

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[1] Gould also argued that the statute violated its rights to due process and equal protection under the Fourteenth Amendment by burdening its right to seek judicial review of Board orders. The district court did not reach this claim (J.S. App. 82 n.11), but it did conclude that the argument was sufficiently substantial to justify an award of attorney's fees under 42 U.S.C. 1988 (see J.S. App. 8).

[2] The district court dismissed three state agency defendants under the Eleventh Amendment; the action proceeded against four state officials under *Ex parte Young*, 209 U.S. 123 (1908) (J.S. App. 53-55). Gould apparently abandoned any claim for damages (*id.* at 55 n.3).

> It may be that the exercise of [the State's] proprietary function is deeply rooted in tradition. However, in this instance, the exercise of that function has the wholly illegitimate purpose of discouraging federal labor law violations by employers.

Indeed, the district court noted (*id.* at 73 (emphasis and citation omitted; brackets in original)) that the State had conceded that it was " 'merely seeking to influence private conduct already prescribed [sic] by federal labor policy.' " The "minimal" (*id.* at 74 (emphasis omitted)) legitimate state concerns were, in the district court's view, outweighed by significant federal interests, such as the policy of uniform federal remedies, that were impinged by the law (*id.* at 74-82), and therefore the debarment statute was preempted by the NLRA.

3. The court of appeals affirmed the district court's invalidation of the Wisconsin statute (J.S. App. 1-44).[3] Relying on *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), and its progeny, the court of appeals concluded (J.S. App. 8-21) that the statute was preempted because it impermissibly supplemented the remedial scheme established by Congress and the Board under the NLRA. Although the debarment statute reflected the "laudable purpose" (*id.* at 14) of promoting compliance with the NLRA, the State's decision to "bas[e] a boycott on federal labor law violations, regardless of where the violations occurred and whether they have been rectified, clearly interfere[d]," in the court of appeals' view (*id.* at

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[3] The court of appeals reversed the district court's award of attorney's fees to Gould under 42 U.S.C. 1988 (J.S. App. 38-44). Gould did not cross-appeal from this portion of the judgment, and it is therefore not before the Court. See, *e.g.*, *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 64 n.5 (1983).

15), with the federal regulatory scheme. Wisconsin's "impos[ition] [of] a much harsher sanction than Congress intended" (*id.* at 26-27) for federal labor law violations, along with the possibility of other states adopting debarment statutes of varying scope and operation (*id.* at 21), demonstrated that "[a]llowing the states indiscriminate punishment of recidivism impermissibly intrudes on the federal scheme of regulation" (*id.* at 20 n.7).

The court of appeals rejected the State's argument that it was legitimately furthering local policy as a market participant, not regulating conduct within the purview of the NLRA. Because "the policy the [state] law promotes is not efficient use of state funds but the intent to effect compliance with the NLRA" (J.S. App. 31), the court of appeals concluded that Wisconsin "simply is not functioning as a private purchaser of services" (*id.* at 30), but rather is "actually regulat[ing] employers' conduct" (*id.* at 27 (footnote omitted)). Even if Wisconsin were acting as a market participant, the court of appeals distinguished cases holding that such conduct does not run afoul of the "dormant" Commerce Clause, because here "Congress has legislated decisively in the area" (*id.* at 22).

INTRODUCTION AND SUMMARY OF ARGUMENT

It has long been settled that states may not provide their own remedies for conduct that violates the National Labor Relations Act. See, *e.g.*, *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959); *Garner* v. *Teamsters Local Union No. 776*, 346 U.S. 485 (1953). As the Court explained in *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 287 (1971), such state remedies must be preempted because the "nature of those remedies that are and are not avail-

able is a fundamental part and parcel of the operative legal system established by the National Labor Relations Act." State sanctions for unfair labor practices encroach on the Board's responsibility to develop and apply a unified remedial scheme that effectuates the policies of the Act.

Wisconsin's debarment law was intended as a penality against violators of the federal Act in order to deter future unfair labor practices. Moreover, the state law clearly operates as such a penalty by preventing employers from competing for the State's business. This conclusion is reinforced by the substantial purchasing power of the State: it blinks reality to suggest that the objects of the State's boycott are not economically harmed because they may take their business elsewhere.

The conduct at which the Wisconsin statute is directed—actual unfair labor practices—is plainly within the core of Congress's concerns in the NLRA. State penalties for such conduct are improper not only because they are uninvited additions to what Congress envisioned as a scheme developed and implemented by a single expert agency but also because they are substantially at odds with the remedial scheme devised by Congress. Under that scheme, the Board cannot impose flat penalties, but rather is empowered to remedy unfair labor practices by restoring the status quo ante and prohibiting the commission of similar practices in the future. The Board's remedies are designed to effectuate Congress's purpose to restore (insofar as possible) the flow of commerce once a violation has been remedied; Wisconsin's law stands as an obstacle to achieving that statutory purpose.[4]

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[4] Indeed, an unfair labor practice adjudication is not necessarily an indication of bad faith on the part of an employer; it can often result from a good-faith effort to test the

Significantly, Congress has refused to enact a federal contract debarment scheme, even one carefully tailored, as Wisconsin's is not, to effectuate the purposes of the NLRA.

The Wisconsin statute is not directed solely at matters of deep local concern: to the contrary, it applies to unfair labor practices anywhere in the country. None of Gould's violations, for example, took place in Wisconsin. There is therefore no warrant for excepting the debarment statute from the usual operation of the preemption doctrine. In any event, this exception from the normal presumption of preemption was crafted by the Court for a limited number of traditional local concerns such as public safety and common law rights. It was never intended to be available for invocation in the wholly conclusory fashion proposed by the State in this case. Indeed, whenever Wisconsin has undertaken to explain what its "deep local concern" might be, it has inevitably spoken of a concern to affect labor relations, and that of course it may not seek to do. That is precisely the subject of concern as to which the federal statutory scheme is self-contained and exclusive.

The State seeks to avoid preemption by urging that it is acting merely as a "market participant" as that term is used in "dormant" Commerce Clause cases where Congress has not legislated. The very triggering mechanism of the state law, however, shows that Wisconsin is not acting as a market participant seeking to advance local economic concerns, but rather as a regulator punishing conduct proscribed by federal law. Moreover, even if the State's statute could be

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scope of rights where this is unclear under the Act. Moreover, under the structure of the Act, it is the only means whereby employers can challenge Board certification decisions, such as bargaining unit determinations.

regarded solely as market participation, the cases on which the State relies are inapposite, because here Congress has legislated with preemptive effect. The market participation doctrine is applicable to dormant Commerce Clause cases only; it has never been invoked in the myriad situations where state laws may conflict with some actual exercise of congressional power —such as designating an article of commerce as contraband which neither the states nor other market participants may lawfully sell or purchase. It is only in the dormant Commerce Clause cases that Congress has not used its constitutional powers to define any national policy and so a state, like any other "market participant," may participate on whatever terms it chooses.

Here, however, Congress has expressed a comprehensive and detailed policy on the subject matter of labor relations and it is the elementary meaning of the Supremacy Clause that all levels of government are bound by that policy. Of course private parties need not share that policy; they may have quite different labor policies, whatever it may mean for a private party to have a "policy" at all. But then private parties, unlike the states, are not bound by the Supremacy Clause, but only by the actual provisions of the law itself.

ARGUMENT

THE NATIONAL LABOR RELATIONS ACT PREEMPTS WISCONSIN'S STATUTORY DEBARMENT FROM STATE CONTRACTS OF EMPLOYERS THAT HAVE VIOLATED THE ACT

The State of Wisconsin has acted to penalize employers that have violated the federal labor law, in the hope of deterring future unfair labor practices. The goal is commendable. Yet Congress intended that remedies for violations of the NLRA be developed

and administered by a centralized expert agency, the National Labor Relations Board. Only in this way can its purpose of promoting the flow of commerce and thus benefiting employers and employees alike be achieved. For this reason, the Court has long recognized that state attempts to supplement the remedies for unfair labor practices applied by the Board are preempted by the Act. While the state-imposed penalty here may be a novel one, its purpose and effect are clear, as are the principles that apply. Wisconsin's debarment statute is preempted by the NLRA and is therefore invalid under the Supremacy Clause.

A. States May Not Provide Their Own Sanctions For Conduct That Violates The Act

A repeated theme of the Court's labor law preemption decisions has been that a state may not provide its own remedies for conduct that actually or arguably constitutes an unfair labor practice under the NLRA.[5] More than 30 years ago, the Court, in holding a state remedy preempted, observed that "when two separate remedies are brought to bear on the same activity, a conflict is imminent." *Garner* v. *Teamsters Local Union No. 776*, 346 U.S. 485, 498-499 (1953). In *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), the seminal labor preemption decision, the Court was "concerned with conflict in its broadest sense; conflict with a complex and interrelated federal scheme of law, *remedy*, and administration" (*id* at 243 (emphasis added)). Where

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[5] The Court's holdings have, of course, been grounded on Congress's intent as expressed in the NLRA: "as in any preemption analysis, [t]he purpose of Congress is the ultimate touchstone." *Metropolitan Life Ins. Co.* v. *Massachusetts*, No. 84-325 (June 3, 1985), slip op. 22 (citation and quotation marks omitted; brackets in original).

an employer's conduct actually violates the Act, "then the matter is at an end, and the States are ousted of all jurisdiction" (*id.* at 245). State remedies that supplement the NLRB's are preempted just as surely as those that could be provided by the Board (*id.* at 247):

> [S]ince remedies form an ingredient of any integrated scheme of regulation, to allow the State to grant a remedy here which has been withheld from the National Labor Relations Board only accentuates the danger of conflict.

The Court amplified on this reasoning in reaffirming *Garmon* in *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees* v. *Lockridge*, 403 U.S. 274 (1971). The Court stated first that preemption is not designed "merely to avoid disparity in the content of proscriptive behavioral rules" (*id* at 287). Because "simple congruity of legal rules does not, in this area, prove the absence of untenable conflict" (*id.* at 290), the "potential for debilitating conflict" (*id.* at 289) is present even when a state applies the same rules as the NLRB does. Remedies provided by states for conduct that violates the NLRA conflict with Congress's purpose of "committ[ing] enforcement of the [Act] * * * to a centralized [federal] agency" (*id.* at 288-289 n.5). Preemption of state remedies is founded on the fact that the "nature of those remedies that are and are not available is a fundamental part and parcel of the operative legal system established by the National Labor Relations Act" (*id.* at 287). See also, *e.g.*, *Local 926, Int'l Union of Operating Eng'rs* v. *Jones*, 460 U.S. 669, 684 (1983) (claim that additional state remedies are not preempted "was squarely rejected" in *Garmon*); *Farmer* v. *United Bhd. of Carpenters, Local 25*, 430 U.S. 290, 305-307 (1977) (damages cannot be awarded

for aspect of tortious conduct that would constitute an unfair labor practice).

The reason for concern with state remedies for conduct that violates the NLRA is plain: Congress has committed to the Board "the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act." *Sure-Tan, Inc.* v. *NLRB*, No. 82-945 (June 25, 1984), slip op. 14; see, *e.g.*, *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194 (1941) (Congress has "entrust[ed] to an expert agency the maintenance and promotion of industrial peace"). Developing and applying remedies to eliminate the "industrial strife" that has caused "obstructions to the free flow of commerce" (§ 1, 29 U.S.C. 151) is "peculiarly a matter for administrative competence" (*Phelps Dodge Corp.*, 313 U.S. at 194). Accordingly, the Board's remedies are "subject to [only] limited judicial review" (*Fibreboard Paper Prods. Corp.* v. *NLRB*, 379 U.S. 203, 216 (1964)). Only a unified system of remedies applied by the Board can "give coordinated effect to the policies of the Act." *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 348 (1953).

The Board is, as the Court stated in *NLRB* v. *Nash-Finch Co.*, 404 U.S. 138, 145 (1971) (footnote omitted; emphasis added), "the *sole* protector of the 'national interest' defined with particularity in the Act." Laws such as Wisconsin's are at odds with the congressional judgment that the Board alone has the expertise to determine what measures to take in response to unfair labor practices and that the policies of the Act are best effectuated by avoiding a diversity of local procedures for dealing with such conduct. Thus, even were it not the case that, as we show below (pages 16-18), Wisconsin's law is inconsistent with the essentially remedial nature of the

scheme that the Board administers, the State's effort to implement its own local "anti-recidivist" policy frustrates the intent of Congress. The problem is, of course, compounded by the prospect of other states enacting their own variations on Wisconsin's law (see note 8, *infra*), thereby creating a pastiche of state penalties imposed on top of the Board's remedial scheme. See *Lockridge*, 403 U.S. at 286 (footnote omitted) (a primary factor in "the enactment of a comprehensive national labor law, entrusted for its administration and development to a centralized, expert agency * * * was the perceived incapacity of common-law courts and state legislatures, acting alone, to provide an informed and coherent basis for stabilizing labor relations conflict and for equitably and delicately structuring the balance of power among competing forces so as to further the common good").

B. Wisconsin's Statutory Boycott Of Federal Labor Law Violators Was Intended To Be And Operates As A Penalty For Unfair Labor Practices

1. The Wisconsin debarment statute penalizes a class of persons defined solely in terms of their commission of unfair labor practices proscribed by the NLRA. The State candidly admitted in the district court that its law is intended to deter violations of the federal statute (J.S. App. 73 (emphasis and brackets in original), quoting Defendants' Br. 12, 18):

> "The state has a deeply rooted policy of discouraging labor law violations, and the State, as a market participator in the purchase of goods and products, can so restrict its purchasers so as *not to promote labor law violators* as an exception to NLRA preemption . . . Wisconsin is not engaging in direct state regulation of private labor conduct, but is merely seeking to *influence*

> *private conduct* already prescribed [sic] by federal labor policy."

Similarly, the State argued in the court of appeals that "Wisconsin has a deeply rooted interest in compliance with the labor laws" (J.S. App. 14; see *id.* at 31). Thus, the policy behind the debarment statute could not be plainer: the State is attempting to influence the conduct of employers to prevent future violations of the NLRA by penalizing those who have violated the Act in the past.[6]

The State is, as it admits (J.S. 19), acting out of "a policy disgust" at dealing with unfair labor recidivists. By contrast, it does not argue that its debarment statute is intended to further some legitimate economic interest of the State. For example, the statute has not been justified by a concern for product quality or uninterrupted supply. Indeed, Wisconsin admits (Br. 30) that debarment is costly to the State and results in "economic inefficiency." It is, moreover, self-evident that the debarment policy can make a difference only when the State's normal procurement criteria would otherwise cause it to deal with the debarred company. Thus, the policy behind the statute is related solely to the State's interest in punishing federal labor law violators and not to any economic self-interest that would benefit an ordinary participant in the market.

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[6] Before this Court, the State ignores its previous representations and suggests (Br. 30-31, 45) that its debarment statute was intended merely to further the State's interest in not giving its custom to employers that have committed unfair labor practices. Even crediting this change of heart, the structure and practical effect of the statute ultimately must be controlling. See, *e.g.*, *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349, 354 (1951).

The practical effect of the statute also is plain: it operates to penalize employers and their employees by barring them from competing for the State's business. Gould faces the loss of $250,000 worth of business with Wisconsin (J.A. 17, 20). Moreover, Wisconsin's debarment sanction extends beyond the immediate employer that has violated the NLRA. Pursuant to the statute, the State has refused to purchase from *any* supplier products that contain *components* produced by employers on the list of violators (J.S. App. 52-53), thus spreading the disruptive effect of the penalty throughout the economy and increasing the likelihood that the debarment statute will in fact influence the conduct of employers, as it was intended to do.

The State of Wisconsin spent almost $7 billion in 1981 alone.[7] While the economic effect on any particular firm would vary according to such factors as its size and the percentage of its business attributable to the State, a boycott by a consumer of this magnitude cannot help but be significant in a large number of cases. The State certainly must have thought this to be true; otherwise, the debarment statute could not have its intended effect of deterring violations of the NLRA. The suggestion of amici National Governors' Association et al. (NGA) that a boycott by Wisconsin "imposes no penalty" because labor law violators are free merely "to take their business elsewhere" (Br. 12; see Br. 21) is thus essentially fatuous.[8]

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[7] Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States* 289 (104th ed. 1984). This figure includes salaries of state employees and transfer payments, but it suffices to demonstrate the scale of the State's purchasing power.

[8] NGA notes (Am. Br. 2 n.1) that at least four other states have passed legislation similar to Wisconsin's. These five

2. The State argues (Br. 31-33) that because its debarment statute does not prescribe rules of conduct for private persons, it is not the sort of state regulation addressed by the Court's labor preemption cases. This argument is unavailing. In the first place, the cases make it clear that states may not establish their own remedies for violations, regardless of whether they have established their own standards of conduct or merely incorporated those set forth in the NLRA as interpreted by the Board (see pages 9-12, *supra*).[9]

Moreover, although the law at issue may be novel, its practical impact on employers and employees is sufficient to bring it within the principles already developed. The Court has cautioned against "elevat[ing] form over substance" in labor preemption cases. *Allis-Chalmers Corp* v. *Lueck*, No. 83-1748 (Apr. 16, 1985), slip op. 9.[10] Here, although the de-

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states combined spent more than $40 billion in 1981. Bureau of the Census, *supra*, at 289. The total amount spent by state and local governments in 1984 for the purchase of goods and services (not including employee compensation) was more than $190 billion. 65 Bureau of Economic Analysis, U.S. Dep't of Commerce, *No. 4, Survey of Current Business* 13 (1985). It is apparent that statutes such as Wisconsin's, especially if they are adopted by more and more states, can be expected to have quite a significant economic impact on employers and employees throughout the nation.

[9] Surely Wisconsin could not prohibit recidivist labor law violators from doing any business within the State. Such a law would be preempted as to business both with private parties and with the State itself. That Wisconsin's penalty has not swept so far, encompassing only the latter prohibition, cannot reasonably be thought enough to make it consistent with federal labor policy.

[10] Plainly, the mere form of state action cannot exempt it from the preemption doctrine. For example, a state statute granting a *preference* in state contract bidding to labor law recidivists would obviously be preempted, as it would tend to

barment statute is not in form identical to the more typical state penalty, such as damages or a fine, in substance it has the same effect: it imposes monetary costs on an employer that has violated the NLRA. Surely Congress did not intend to permit Wisconsin to impose a $250,000 fine on an employer that has been found to have committed three unfair labor practices. Nor should it be understood as having intended to allow the State instead to withdraw $250,000 worth of business on the same factual predicate.[11]

This conclusion is reinforced by the "essentially remedial" nature of the NLRA. *Republic Steel Corp.* v. *NLRB*, 311 U.S. 7, 10 (1940); accord, *Local 60, United Bhd. of Carpenters* v. *NLRB*, 365 U.S. 651, 657-658 (1961). The Board for example, may not fine employers as a means of deterring violations of the Act (*Republic Steel Corp.*, 311 U.S. at 12):

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encourage labor law violations. Because Wisconsin's law debarring recidivists conflicts (albeit in a different way) with the achievement of federal labor policy, it too is preempted.

[11] Amicus AFL-CIO relies on the plurality opinion in *New York Tel. Co.* v. *New York State Dep't of Labor*, 440 U.S. 519 (1979), in arguing (Br. 18-19) that a state's expenditure of public funds (there, unemployment benefits) does not come within the traditional labor preemption doctrine. Aside from the substantially different factual situation—here, the State's decision is predicated on unfair labor practice findings and is intended to penalize violations of the NLRA—the views of the plurality of three Justices in that case failed to gain the acceptance of a majority of the Court. The case was decided on the narrow ground of Congress's intent with respect to unemployment compensation as expressed in the legislative histories of the NLRA and the Social Security Act, which were passed within a short time of one another. See *id.* at 540-546 (plurality opinion); *id.* at 546-547 (Brennan, J., concurring in the result); *id.* at 547-551 (Blackmun, J., concurring in the judgment).

> [I]t is not enough to justify the Board's [remedy] to say that [it] would have the effect of deterring persons from violating the Act. That argument proves too much, for if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end.

Thus, while the Board is free in any case to take whatever measures are required to restore circumstances to what they would have been had the unfair labor practices not been committed (*Phelps Dodge Corp.*, 313 U.S. at 194) and to prohibit the commission of the same or similar unfair labor practices in the future (*NLRB* v. *Raytheon Co.*, 398 U.S. 25, 27 (1970); *NLRB* v. *Mexia Textile Mills, Inc.*, 339 U.S. 563, 567-568 (1950)), the Board is not empowered by the scheme devised by Congress to issue an order that, like the Wisconsin debarment statute, operates as a flat penalty for committing a given number of unfair labor practices and that bears no necessary relation to the nature and consequences of the unfair labor practices concerned.

Congress sought in the Act to "minimiz[e] disruption of interstate commerce" by furthering "responsible and stable labor relations." *Retail Clerks Int'l Ass'n, Local Unions Nos. 128 & 633* v. *Lion Dry Goods, Inc.*, 369 U.S. 17, 27 (1962). It would be odd indeed to suppose that Congress intended that the States could set up their own deterrent system of financial penalties for violations of the NLRA when the Act itself "does not prescribe penalties or fines" but rather seeks only "the protection and compensation of employees" (*Republic Steel Corp.*, 311 U.S. at 10). Wisconsin's imposition of a penalty that Congress denied the Board would quite plainly stand

as an obstacle to the achievement of the purposes of the NLRA.

C. The Penalty Imposed By Wisconsin Is Preempted By The National Labor Relations Act

1. As an additional sanction for violations of the NLRA, Wisconsin's debarment statute is preempted by the federal Act under the principles enunciated by this Court time and again (see pages 9-12, *supra*). The Court in *Garmon* declared (359 U.S. at 243-244) that a state law would not be preempted if it addressed conduct that was "a merely peripheral concern of the [NLRA]" or that "touched interests so deeply rooted in local feeling and responsibility" that "compelling congressional direction" would be required for preemption. See also, *e.g.*, *Local 926, Int'l Union of Operating Eng'rs*, 460 U.S. at 676. Neither exception is available to the State here.[12]

a. Far from applying to "merely peripheral" conduct, the Wisconsin law strikes at the heart of the NLRA: actual unfair labor practices as determined by Board orders enforced by courts of appeals. As we have explained (pages 9-12, *supra*), the coordinated remedial scheme developed and applied by an expert federal agency is central to the achievement of Congress's purposes in enacting the NLRA. A welter of state laws, such as already is beginning to

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[12] Because Congress has actually addressed the employer's conduct in the NLRA, these exceptions are not in fact directly applicable here. See *Brown* v. *Hotel & Restaurant Employees Int'l Union Local* 54, No. 83-498 (July 2, 1984), slip op. 10-11; *Garmon*, 359 U.S. at 245. The analysis of federal and state interests is, however, relevant to whether Congress did intend to preempt a particular type of state regulation. *Metropolitan Life Ins. Co.*, slip op. 24 n.27. We will use the "peripheral concern" and "local interest" rubrics here only because they seem a useful way of rebutting the State's contentions.

exist (see NGA Am. Br. n.1), each withdrawing business for varying lengths of time from employers that have committed varying numbers of unfair labor practices anywhere in the country, would obviously disrupt the uniform administration of the Act that Congress sought to achieve, to the detriment both of employers and employees.[13]

Indeed, in considering and rejecting a proposed debarment scheme, Congress recognized that debarment of labor law violators from government contracts must be treated as an integral part of the federal regulatory scheme. A federal contract debarment program for labor law recidivists was proposed as part of the Labor Law Reform Act of 1978. S. 2467, 95th Cong., 2d Sess. The bill's supporters made it clear that such a measure must be confided initially to the discretion of the Board's General Counsel, acting under limits carefully defined by Congress, if it is to effectuate, rather than thwart, federal labor policy:

> Of course, a debarment program cannot and should not be utilized to achieve labor relations ends contrary to those established by Congress. This bill prevents such practices by placing initial control of the remedy in the Labor Board,

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[13] The State argues (Br. 40-44) that the *Garmon* preemption doctrine applies only to prevent conflicting state and federal rules of conduct and to protect the Board's primary jurisdiction to determine the legality of conduct under the NLRA in the first instance. These are of course grounds for preemption under *Garmon*, but not the only ones. It is equally clear that preemption is necessary to prevent states from adding to the federal remedial scheme, regardless of the consistency of their subsantive rules with those of the Act. See pages 9-12, *supra*. None of the cases cited by the State in any sense overrules the application of *Garmon* and *Lockridge* to state-supplied remedies for conduct that violates the Act.

> which has the responsibility of enforcing the unfair labor practice standards already declared in Section 8 of the NLRA.
>
> Under the bill, the General Counsel of the Board may issue a complaint including the recidivism allegation which can lead to debarment. The Committee's intent is that he not include this allegation with respect to minor violations or those where willfulness cannot be proven, or in other circumstances in which debarment would be inappropriate.

S. Rep. 95-628, 95th Cong., 2d Sess. 30 (1978). The report goes on to define "willfulness" and to make clear that only conduct that violates an outstanding Board order is covered by the "debarment sanction" (*id.* at 31).[14] The period of debarment would be adjustable to "effectuate the purposes of the NLRA" (*ibid.*); debarment similarly could be rescinded to protect employees or to further the policies of the Act (*id.* at 32).

The congressional consideration of this bill demonstrates the functional connection between debarment and the operation of the federal labor law scheme. The finely tuned approach suggested by the Committee in order to avoid conflict with the NLRA contrasts sharply with the mechanical Wisconsin law, which takes no account of the willfulness of violations or other circumstances that may render debarment inappropriate and indeed counterproductive to the goals of the Act. That Congress has thus far not enacted a debarment sanction underscores the need for preemption: "to allow the State to grant a remedy

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[14] Accordingly, the enforcement of Board orders—the basic predicate for debarment under Wisconsin's law—would not have been sufficient for debarment under the federal bill. Only if the employer were in contempt of an enforced Board order would the federal sanction have applied.

* * * which has been withheld from the National Labor Relations Board only accentuates the danger of conflict" (*Garmon*, 359 U.S. at 247).[15] Indeed, this conflict is highlighted by the fact that the federal bill was rejected at least in part because the debarment sanction was considered incompatible with the NLRA. As Senators Hatch and Hayakawa stated (S. Rep. 95-628, *supra*, at 68):

> The [debarment] remedy is quite clearly punitive in nature. It constitutes punishment against employers without providing any compensation whatsoever for employees. Ironically, in its zeal to punish employers, the remedy will often result in a significant loss of jobs—occasioned by the loss of government contracts—for the very employees it was designed to protect.

Moreover, the Board already has the power to tailor its remedies to take into account the impact of recidivism on the administration of the NLRA. See, *e.g.*, *J.P. Stevens & Co.* v. *NLRB*, 417 F.2d 533, 538-541 (5th Cir. 1969) (union afforded access to company bulletin boards and to a list of names and addresses of employees; special requirements imposed

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[15] Amici NGA would discount the relevance of Congress's refusal to pass a federal debarment sanction on the ground that it does not help to demonstrate Congress's intent in passing the NLRA (Br. 22 n.14). Congress's actions subsequent to enactment of the NLRA, however, can prove a helpful guide to the difficult determination of the preemptive scope of the Act. See *Brown* v. *Hotel & Restaurant Employees Int'l Union Local 54*, slip op. 15-16; *NLRB* v. *Gullett Gin Co.*, 340 U.S. 361, 365-366 (1951). While the intent of a subsequent Congress may of course differ from that of an earlier one, Congress's recent rejection of a federal debarment sanction is quite germane to the practical question of whether a state debarment penalty would interfere with the achievement of the goals of the NLRA.

respecting distribution and reading of the Board's notice). The Board may, for example, issue a "broad order" enjoining unlawful conduct directed at parties other than those involved in the particular proceeding where there is a history of repeat violations. See, *e.g.*, *NLRB* v. *Local Union, No. 3, Int'l Bhd of Elec. Workers*, 477 F.2d 260, 268 (2d Cir.), cert. denied, 414 U.S. 1065 (1973). And, as the court of appeals noted (J.S. App. 20 n.7), the Board may seek court enforcement of its order even where compliance has taken place, if, in its judgment, the remedial purposes of the Act so require. See 29 C.F.R. 101.13(b); *NLRB* v. *Mexia Textile Mills, Inc.*, 339 U.S. at 567-568; see also *Wallace Corp.* v. *NLRB*, 323 U.S. 248, 254-255 (1944) (Board can go behind settlement agreement to remedy subsequent violations of the Act). Like the bill considered by Congress, the Board's carefully constructed remedies for recidivism demonstrate the delicate balancing necessary to tailor such a remedy to the goals of the Act, balancing that would be wholly frustrated by the Wisconsin law.

b. Nor is the State acting solely with respect to matters of deep local concern. The "local concerns" that may permit a state law to stand in the face of potential conflict with the NLRA are for the most part limited to a circumscribed set of traditional, core interests behind state public welfare and safety statutes and common law. See, *e.g.*, *Belknap, Inc.* v. *Hale*, 463 U.S. 491 (1983); *Linn* v. *United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966); *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U.S. 656 (1954). While the State undoubtedly has an interest in how it spends its money, the debarment statute does not further any state economic interest. To the contrary, the statute concededly costs the State money by preventing it

from doing business with contractors whose bids provide the most attractive combination of price, quality, and other features.[16]

By contrast, the extent of any legitimate concern that Wisconsin may have for violations of the federal labor Act—a motivating force behind the debarment statute (see pages 12-13, *supra*)—is significantly weaker than its sphere of action in protecting its fisc and citizens. The state law, moreover, is not limited to NLRA violations within Wisconsin. To the contrary, it applies to unfair labor practices occurring anywhere in the United States. Indeed, none of the violations of the Act that formed the predicate for Gould's debarment occurred in Wisconsin.[17] This case is thus a far cry from those involving conduct in violation of state law that took place within the state's own borders. See, *e.g.*, *Belknap, Inc.* v. *Hale*, *supra* (misrepresentation and breach of contract); *Linn* v. *United Plant Guard Workers, Local 114*, *supra* (defamation). There is no need to require "compelling congressional direction" (*Garmon*, 359 U.S.

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[16] The motivation behind Wisconsin's statute suggests another way in which it is incompatible with federal labor policy. The State has acted to further what it perceives to be the interest of employees' organizational rights by boycotting goods produced entirely or in part by labor law violators. Congress, however, has expressly forbidden unions from requiring employers to boycott goods of neutral employers. See § 8(e), 29 U.S.C. 158(e). Surely Congress did not intend to allow the states (presumably at the behest of union advocates) to engage in conduct so similar to the statutorily disfavored secondary boycott.

[17] Moreover, Gould's divisions were responsible for their own labor relations policies (State Br. 13, citing R. 2), and Gould no longer owned the divisions that had committed the unfair labor practices at the time that it was debarred (J.S. App. 7).

at 244) before concluding that Congress did indeed intend to preempt such far-reaching state sanctions.

2. To escape the obvious conclusion that state penalties for unfair labor practices are preempted by the NLRA, the State, supported by amici (NGA Br. 6-12; AFL-CIO Br. 19-22), argues (Br. 19-38) that it is acting as a "market participant" rather than in its regulatory capacity and that as such its actions may not be preempted. In making this argument, the State and amici rely on a line of cases decided under the so-called "dormant" Commerce Clause, addressing the limitations on state activity burdening interstate commerce in areas where Congress has not itself legislated. The argument fails for two reasons. First, Wisconsin is not acting as a market participant as that term has been understood by the Court. Second, even if it were, the dormant Commerce Clause cases are inapplicable here, where Congress has exercised its commerce power in the NLRA.

a. In the few cases in which this Court has applied the market participant doctrine, the state's activities were all designed to "limit[] benefits generated by a state program to those who fund the state treasury and whom the State was created to serve." *Reeves, Inc.* v. *Stake*, 447 U.S. 429 (1980). Thus, in *Reeves*, a state sold cement that it had produced at a plant funded with state taxpayers' dollars only to state residents in times of shortage. In *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976), a state's bounty program for abandoned vehicles favored in-state processors. As the Court explained in *Reeves* (447 U.S. at 442-443 n.16), the state in *Alexandria Scrap* was motivated by the "desire to channel state benefits to the residents of the State supplying them." Similarly, in *White* v. *Massachusetts Council of Constr. Employers, Inc.*, 460

U.S. 204 (1983), a municipal ordinance favored municipal residents in construction projects financed in whole or in part by city funds. Finally, in *South-Central Timber Development, Inc.* v. *Wunnicke*, No. 82-1608 (May 22, 1984), the plurality noted (slip p. 15) that the state had acted "with the permissible state purpose of fostering local industry." [18]

Here, Wisconsin has not acted with the purpose or effect of granting its own residents preferential treatment in the distribution of State funds. Rather, it is using its purchasing power for the purpose and effect of punishing federal labor law violators. To accomplish this result, the State refuses to purchase goods from vendors such as Gould regardless of whether they are in-state or out-of-state and even when they have made the lowest bid or are otherwise the most attractive. This conduct bears little resemblance to that of a private actor in the marketplace, for it furthers no economic interest of the State or its residents.[19] Once the State goes beyond conduct

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[18] The plurality in *South-Central Timber* concluded (slip op. 14-17), however, that the state did not act as a market participant because it imposed "downstream" restrictions on timber processing by its customers. Similarly, here Wisconsin has imposed an "upstream" restriction that none of its direct suppliers may themselves have obtained supplies (as to the goods sold to the State) from Gould (see pages 2, 14, *supra*). This factor alone is sufficient to take Wisconsin's conduct outside the market participant doctrine.

[19] The State does not contend, for example, that it is more expensive or disruptive to deal with labor law violators. Cf. *Amalgamated Transit Union, Division 819* v. *Byrne*, 568 F.2d 1025, 1030 (3d Cir. 1977) (en banc) (State's refusal to subsidize transportation firms that agreed to an uncapped cost-of-living clause in a collective bargaining agreement furthered the State's interest in conserving scarce financial resources).

that would be normal or economically rational for a private party in the market to achieve other goals, it is no longer acting as a market participant.[20] By whatever method it has chosen, it is regulating.

b. Even if Wisconsin were acting as a market participant as that term is used in the dormant Commerce Clause cases, that consideration is not germane to whether its actions are preempted under the NLRA. The Commerce Clause is a "self-executing limitation on the power of the States to enact laws imposing substantial burdens on [interstate] commerce." *South-Central Timber*, slip op. 5. At issue in every one of the Court's market participant cases was this self-executing, "dormant" aspect of the Commerce Clause. As the Court stated in *Alexander Scrap* (426 U.S. at 810 (footnotes omitted; emphasis added)), "[n]othing in the purposes animating the Commerce Clause prohibits a State, *in the absence of congressional action*, from participating in the market and exercising the right to favor its own citizens over others." The Court did not decide (*id.* at 810 n.19) "whether Congress could prohibit the

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[20] As the State appears to recognize (Br. 30), a corporation's management may not further its own social policies at the economic expense of its shareholders. See, *e.g.*, *CFTC* v. *Weintraub*, No. 84-261 (Apr. 29, 1985), slip op. 5. A state, by contrast, may use its coercive power to tax its citizens in order to finance economically inefficient policies. Thus, contrary to the State's argument (Br. 29-30), Wisconsin is not merely acting as General Motors would, and it is, for that reason among others, not entitled to be excepted from the preemptive effect of the NLRA. Moreover, even if Wisconsin could in this manner permissibly further its local interest in compliance with the labor laws within its borders, the law here sweeps much more broadly, reaching violations occurring anywhere in the United States.

type of selective participation in the market" present in that case.

Here, Congress *has* acted pursuant to its commerce power in enacting the NLRA. Its intent, as the Court has repeatedly recognized (see pages 9-12, *supra*), was to preempt the field of remedies for unfair labor practices, and thereby to prohibit the states from acting to impose penalties for such conduct regardless of the form of those sanctions. There is nothing to suggest that Congress intended states to be able to penalize labor law violators through the use of the public purse, when the effect is to undermine the remedial scheme administered by the NLRB just as if they had acted by more traditional routes. Indeed, Congress's own rejection of a debarment sanction (see pages 19-21, *supra*) suggests precisely the opposite.

In *United Building & Constr. Trades Council* v. *Mayor of Camden*, No. 81-2110 (Feb. 21, 1984), slip op. 10, the Court "decline[d] to transfer mechanically into [the Privileges and Immunities Clause] context [the market participant analysis fashioned to fit the Commerce Clause." Just as the Privileges and Immunities Clause "imposes a direct restraint on state action" (*id.* at 11) regardless of the form of that action, so does the NLRA, through the Supremacy Clause. That the dormant Commerce Clause does not do so is simply irrelevant.

Amici NGA et al. make two arguments (Br. 6-12) to counter this reasoning. First, they attempt to distinguish between Congress's power to regulate the states and its intent to preempt state action. This distinction lacks substance. If Congress has the power expressly to prevent the states from enacting statutes such as Wisconsin's, it certainly may exercise that power through its implicit intent to preempt those

statutes. The argument therefore collapses into NGA's second contention, which is that Congress lacks the authority under the Commerce Clause to set limits on a state's conduct as a market participant. Amici assert that the dormant Commerce Clause cases stand for the proposition that Congress has no power under the Commerce Clause to legislate with respect to a state's market participation except insofar as it has legislated in a like manner with respect to private persons in the market. The State appears to make a similar agument (Br. 29-30).

This argument fails for several reasons. First, the Court has expressly stated that it was not addressing the applicability of the market participant doctrine to circumstances (like the present) where Congress has exercised its legislative power (see page 26, *supra*). Second, the "Commerce Clause is a grant of authority to Congress, not a restriction on the authority of that body." *Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. at 213. It therefore does not follow from the limitations on the reach of the dormant Commerce Clause that Congress lacks the power to regulate states' market conduct. At this late date, it is quite far-fetched to suggest that the NLRA is unconstitutional insofar as it reaches the states qua market participants. See generally *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding constitutionality of the NLRA under the Commerce Clause).

Indeed, the State and amici appear to admit as much; they argue primarily that Congress cannot regulate state market participation to any greater degree than it regulates private market conduct. But certainly nothing in the Commerce Clause itself requires such identical treatment of public and private

entities. The Supremacy Clause makes the policy of Congress the policy of the states as well. Accordingly, as amicus AFL-CIO properly concedes (Br. 12-13), this Court has recognized that governments and private actors are not similarly situated—that some conduct, for example, may be protected under the NLRA "'against state, but not employer interference.'" *Lodge 76, Int'l Ass'n of Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 145 n.6 (1976) (quoting Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1346 (1972) (footnote omitted)). This is especially true here, where the State is not acting as any rational private actor could or would (see pages 22-26 & note 20, *supra*). Whatever the force in other circumstances of amici's argument that Congress cannot regulate state market participation to any greater degree than it addresses the participation of private persons, it is largely inapposite here, where the state's rule serves only a regulatory rather than a business purpose and similar private conduct accordingly would be wholly aberrational.[21] Certainly Congress need not have addressed the idiosyncratic private ~~action~~ actor that boycotts labor law recidivists in order to be understood to have

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[21] The regulatory nature of the State's rule also wholly distinguishes the question here from the Tenth Amendment concerns that divided the Court in *Garcia* v. *San Antonio Metro. Transit Authority*, No. 82-1913 (Feb. 19, 1985), and its predecessor cases. In contrast to the congressionally prescribed rules for state employment at issue in those cases, the present case raises only a traditional preemption issue—whether state-imposed sanctions regulating private conduct are compatible with a federal scheme regulating the same private conduct. Our position here, therefore, is entirely consistent with the views expressed by all Members of the Court in *Garcia*.

intended to preempt state boycotts which so plainly hobble Congress's purpose in the NLRA—promote commerce under a remedial scheme developed and applied solely by the Board.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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I authorize the filing of this brief.

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